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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

PATRICIA BONAVIDO,
Plaintiff and Appellant,

v.

JITU SOMAYA,
Defendant and Respondent.

A094965

(S.F. City & County
Super. Ct. No. 310694)

This is the fourth action between Patricia Bonavito (Bonavito) and Jitu Somaya (Somaya). Bonavito filed this lawsuit against Somaya on March 15, 2000, claiming wrongful eviction, breach of contract, negligent management of property, and breach of the covenant of quiet enjoyment. The trial court granted summary judgment in favor of Somaya on the grounds that the prior settlement agreement between the parties barred this action. Bonavito appealed, and we uphold the lower court.

BACKGROUND

According to Bonavito, Somaya is the biological father of Chenille Bonavito (Chenille) and Bonavito is her mother. She asserts that, in 1995, Somaya and Bonavito had an “unwritten understanding” that Bonavito and Chenille could live on Somaya’s property at 2846 Greenwich Street in San Francisco (Greenwich property) in exchange for Somaya’s not paying child support. Based on this understanding, Bonavito and Chenille moved to the Greenwich property in July 1996.

On August 4, 1998, after the relationship between Bonavito and Somaya allegedly deteriorated, Somaya filed a contract action for rent for the Greenwich property (rent action). Bonavito filed a cross-complaint for declaratory relief. In the cross-complaint, she alleged that Somaya had stated that she and Chenelle “would live in the unit rent-free and that [Somaya] would pay the mortgage, taxes, insurance, and all related charges for this unit in lieu of any responsibility he would have to pay child support for Chenelle Bonavito.” She further alleged that “the agreement is valid . . . and that she is entitled to continue occupying said residential unit free and clear of any obligation to pay rent, mortgage payments, or any other related costs of said residential unit until such time as a determination is made in the superior court of this county as to cross-defendant’s obligation to pay child support. The matter of cross-defendant’s obligation to pay child support is currently pending before the court in a complaint to establish parent-child relationship”

Prior to filing the cross-complaint, Bonavito had brought a child support action against Somaya on August 27, 1998 (child support action). On November 18, 1998, the parties stipulated to a court order in the child support action. Somaya agreed not to terminate the tenancy of Bonavito and Chenille from his property “pending resolution of the [rent action, which was to be mediated, and the child support action] or further order of the court.”

On April 14, 1999, Somaya served Bonavito with a three-day notice to pay rent or quit the Greenwich property. Six days later he filed an unlawful detainer action against Bonavito (unlawful detainer action).

On April 30, 1999, in the child support action, the court ordered Somaya to pay \$2,117 in child support (retroactive to September 1998), one-half the cost of the tuition for private school for Chenille, and \$10,000 in attorney fees.

On June 21, 1999, the parties, through their counsel, stipulated to a settlement of the unlawful detainer action before Judge Paul H. Alvarado. Bonavito agreed to vacate the Greenwich property by July 20, 1999. Once she did so, the eviction action would be dismissed. Somaya reserved his claims of back rent and any other damages available in this

action, which were to be tried in the rent action. Until judgment in the rent action, Bonavito agreed not to seek enforcement of the child support order.

Bonavito vacated the Greenwich property and the court dismissed the unlawful detainer action with prejudice on September 14, 1999.

The rent action was assigned to trial before Judge Stuart Pollak, and the parties entered into settlement discussions with Judge Pollak. The court announced that the parties, who were represented by counsel, had reached an agreement and the terms of the agreement were being placed on the record.

The court stated: “The understanding is that Ms. Bonavito will pay to Mr. Somaya the total sum of \$7,117, and that will be in exchange for the dismissal of the complaint with prejudice. And Ms. Somaya—excuse me, Ms. Bonavito is also agreeing to dismiss her cross-complaint with prejudice.” The payment of \$7,177 represented the back rent owed to Somaya minus the child support and attorney fees owed from the family support action. After explaining the child support payments that were to be made in the future, the court inquired: “As far as the attorneys are concerned, does that state everything fully and accurately, or is there anything else that needs to be spelled out or modified?” Counsel for Somaya responded: “No. [¶] I want to clarify that [the child support order] that addressed child support, tuition and attorney fees is satisfied in full by this agreement.” Counsel for Bonavito stated: “That’s correct.”

The court further explained: “What the parties are dismissing are the claims that are included in the complaint and the cross-complaint.” Counsel for Bonavito stated: “And the affirmative defenses.” The court agreed: “And the affirmative defenses in this action.” After a brief discussion regarding child support, the court asked whether both the attorneys were satisfied and they responded affirmatively. The court then separately asked the parties whether the agreement was acceptable to them, and both Bonavito and Somaya stated that it was. They both also responded that they understood the agreement.

On March 15, 2000, Bonavito filed a complaint against Somaya for damages for wrongful eviction from the Greenwich property, breach of contract, negligent management of the Greenwich property, and breach of the covenant of quiet enjoyment. Somaya moved

for summary judgment on the complaint. The court ruled that, as a matter of law, the settlement in the rent action barred this action.

Bonavito filed a timely notice of appeal.

DISCUSSION

Bonavito complains that the court improperly granted summary judgment against her complaint. The court properly grants summary judgment if the record establishes no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has met the burden of showing a cause of action has no merit if the party establishes one or more elements of the cause of action cannot be established. (*Id.*, subd. (o)(2); see also *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573.) Once the defendant meets this burden, the plaintiff must show a triable issue of fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (o)(2).) We review the record de novo. (*Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548.)

Somaya moved for summary judgment on the basis that the prior settlement agreement in the rent action barred Bonavito's current complaint for wrongful eviction. Bonavito points out that this was not raised by Somaya's seven affirmative defenses to the complaint in this lawsuit. These defenses were: contributory negligence/comparative fault, no cause of action stated, failure to mitigate damages, statute of limitations, waiver, estoppel, collateral estoppel, res judicata, and accord and satisfaction. Bonavito contends that the summary judgment could only be based on one of the defenses and she devotes the bulk of her brief to explaining why each of these defenses could not be a basis of summary judgment.

The fact that the summary judgment was not based on one of the affirmative defenses does not warrant reversal on appeal. We have already held that responding to a summary judgment motion without claiming that the answer was defective or insufficient to support the summary judgment motion is a partial waiver of the right to rely upon these defects on appeal. (*Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 876.) "In this circumstance it would be unfair to ground a ruling on the inadequacy of the pleadings if the

pleadings, read in the light of the facts adduced in the summary judgment proceeding, give notice to the plaintiffs of a potentially meritorious defense. If plaintiffs had openly challenged the adequacy of defendants' pleading in the trial court, and defendants tendered a potentially meritorious unpled defense, it is likely that they would have been allowed to amend their answer. [Citation.]” (*Ibid.*) Bonavito opposed the motion for summary judgment without raising an objection that she had no notice of this defense and, “by so litigating the merits of the summary judgment motion, waived any right to claim on appeal that the answer was defective.” (*Id.* at p. 877.) Moreover, although Code of Civil Procedure section 664.6¹ provides for a summary procedure to enforce a settlement agreement, it is well established that summary judgment is an appropriate remedy for enforcing settlement agreements (see e.g., *Kilpatrick v. Beebe* (1990) 219 Cal.App.3d 1527, 1529).

The other principal argument set forth by Bonavito is that settling the rent and unlawful detainer actions did not bar this current lawsuit. Although neither party cites *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911, the Supreme Court in this opinion set forth the criteria the court should consider when determining whether the parties entered into a binding settlement. The Supreme Court held that the court “should consider whether (1) the material terms of the settlement were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties expressly acknowledged their understanding of and agreement to be bound by those terms. In making the foregoing determination, the trial court may consider declarations of the parties and their counsel, any transcript of the stipulation orally presented and recorded by a certified reporter, and any additional oral testimony.” (*Ibid.*)

¹ Code of Civil Procedure section 664.6 provides: “If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.”

The record unequivocally establishes that two of the requirements provided in *In re Marriage of Assemi*, *supra*, 7 Cal.4th at page 911 were satisfied: The court questioned the parties about their understanding of the terms of the agreement, and both parties stated that they understood the terms of the agreement and that the settlement, as provided by Judge Pollak, was acceptable to them. Counsel for both parties also agreed with the terms of the agreement as presented by Judge Pollak.

The question remains whether the “material terms of the settlement were explicitly defined” (*In re Marriage of Assemi*, *supra*, 7 Cal.4th at p. 911.) Bonavito contends that the settlement agreement in the rent action is ambiguous about what claims were being released. When a contract contains ambiguous terms, Bonavito points out, the court will consider parol evidence to determine the parties’ intent. (*Wyda Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 (*Wyda*).) She claims that evidence exists that she intended to preserve her cause of action for wrongful eviction and breach of contract, and therefore triable issues of fact remain as to each of these claims.

We, however, are only concerned with the intent of the parties if the language of the agreement is ambiguous. (See, e.g., *Wyda*, *supra*, 42 Cal.App.4th at p. 1710.) Here, the settlement agreements were not ambiguous. The stipulated agreement in the unlawful detainer action specified that Bonavito would leave the Greenwich property and Somaya’s claims regarding back rent and any other damages available in the unlawful detainer action would be tried in the rent action. With regard to the settlement agreement in the rent action, the court specifically stated twice that Bonavito was agreeing to dismiss her cross-complaint with prejudice, and the court also clarified that she was dismissing her affirmative defenses in this action.

Bonavito claims that Judge Pollak advised her counsel and her that the settlement would allow her to pursue her wrongful eviction claim. She cites evidence in the record to support this claim but, other than her own statements that Judge Pollak made these statements, the record is devoid of any evidence indicating that Judge Pollak made any such statement. The record establishes that he did not make any such statement at the hearing on

the settlement. Further, there is nothing in the record to suggest that Somaya ever agreed to such a condition.

Bonavito contends that, even if she agreed to dismiss her cross-complaint, the causes of action in this lawsuit differ significantly from any claims in her cross-complaint. Her current lawsuit, Bonavito asserts, involves a continuing right of possession to the Greenwich property and for wrongful eviction; these issues, she maintains, were not at issue in the rent action. She contends that she did not release her claim for wrongful eviction and, since this claim was not specifically waived, she still may pursue it.

Contrary to Bonavito's assertions, her cross-complaint in the rent action did involve her right to occupy the Greenwich property, as she specifically alleged that she was entitled to continue to occupy the Greenwich property without paying rent in exchange for Somaya's not having to pay child support. Her cross-complaint was for declaratory relief, and she sought a judgment regarding her "use and occupancy" of the Greenwich property. Moreover, the court stated that the parties were dismissing their affirmative defenses in the rent action. Bonavito filed an answer to Somaya's complaint in the rent action by asserting the following facts as separate affirmative defenses: Somaya "permitted [Bonavito] and [their] daughter to use and occupy the [Greenwich property] in lieu of paying child support." One of the affirmative defenses listed was fraud.

This current lawsuit contains allegations that Somaya wrongfully evicted Bonavito from the Greenwich property; that Somaya breached the stipulated agreement in the family support action by attempting to evict her from her home prior to resolving the family support action; that Somaya committed fraud when he told her that he wanted their daughter and her to move to the Greenwich property; and that, by serving the eviction notices, Somaya negligently managed his Greenwich property and breached the implied covenant of quiet enjoyment of their home. All of these claims, with the exception of the breach of contract action, are identical to her claims and defenses in the rent action in that they all essentially assert that she was wrongfully evicted from the Greenwich property because she was entitled to remain on the property rent-free in lieu of child support. The breach of contract action involved alleged damage resulting from her eviction from the Greenwich

property prior to the resolution of the family support action, but this claim is clearly barred by her decision to enter into a stipulated settlement in the unlawful detainer action.

If Bonavito believed that she were not releasing all of her claims, she should have made this clear at the hearing on the settlement in the rent action. The court invited the parties to “spell[] out” or to modify the terms of the settlement. Bonavito never stated that she wished to preserve her wrongful eviction claim or any other claim regarding the Greenwich property. At this stage in the process, we are not concerned with what she may have been thinking, because she appeared to agree with the terms of the settlement as they were expressly stated by Judge Pollack. “The law imputes to a person an intention which corresponds to the reasonable meaning of his or her words and acts. Thus, where a person’s words or acts, judged by a reasonable standard, manifest an intent to agree to a certain matter, that agreement is established, regardless of what may have been the person’s real but unexpressed state of mind on the subject. [Citations.] Plaintiff’s undisclosed intent concerning his claim against defendant is simply inadmissible to contradict the comprehensive and broad language of the settlement agreement’s release of claims clause. [Citations.]” (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 560-561.)

Bonavito argues that the settlement had to specify that she was waiving her eviction claims and she cites *Ray v. Industrial Acc. Com.* (1956) 146 Cal.App.2d 393 (*Ray*) and *Landeros v. Pankey* (1995) 39 Cal.App.4th 1167 (*Landeros*). Neither case, however, benefits Bonavito.

In *Ray*, an employee was injured while at work and he entered into “‘Compromise and Release’” of his claim for ordinary compensation with the employer’s insurance carrier. (*Ray, supra*, 146 Cal.App.2d at p. 395.) Subsequently, the employee sued the employer for serious and willful misconduct. The court held that the insurer could not be liable for the serious or willful misconduct of the employer and therefore the insurance carrier could not bargain for the release of the employer from such additional compensation. (*Id.* at p. 397.) In contrast, here, the same parties were involved in the agreement and both Somaya and Bonavito had the authority to bargain for the dismissal of

all claims related to the complaint, cross-complaint, and affirmative defenses in the rent action. The holding in *Ray* therefore has no applicability to the facts in this case.

Landeros is also unavailing. The defendant in *Landeros* filed a complaint in unlawful detainer against the plaintiffs and they raised as an affirmative defense to the nonpayment of rent that the defendant had breached the warranty to provide habitable premises. (*Landeros, supra*, 39 Cal.App.4th at p. 1170.) The parties entered into a stipulated judgment stating that the defendant would receive \$300 and have possession of the property by a specific date, but the agreement contained “no specific or general language concerning the dispute over the habitability of the property . . . nor any comprehensive language typically employed to indicate a settlement of any and all issues in dispute.” (*Id.* at pp. 1170-1171.) Since the prior unlawful detainer judgment was silent regarding the plaintiffs’ relinquishing any claims regarding their occupation of the premises, the face of the judgment did not establish that the parties intended for the agreement to resolve all claims between the parties. (*Id.* at p. 1174.) In contrast, the settlement between Bonavito and Somaya was not silent regarding Bonavito’s claims and defenses in the rent action: the stipulated settlement specifically dismissed with prejudice all of the claims included in the complaint, cross-complaint, and affirmative defenses.

Here, the terms of the settlement were not ambiguous: Bonavito’s defenses and the claims included in her cross-complaint for declaratory relief, which sought a judgment that Bonavito was entitled to remain in the Greenwich property in lieu of child support, were dismissed with prejudice. Bonavito’s current lawsuit attempts to resuscitate these same claims and therefore violates the terms of the stipulated settlement. Accordingly, the trial court properly granted summary judgment against her complaint.

DISPOSITION

The judgment is affirmed. Somaya is awarded costs.

Lambden, J.

We concur:

Kline, P. J.

Haerle, J.